IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN, JAIPUR BENCH, JAIPUR

D. B. CIVIL SPECIAL APPEAL (WRITS) No. 252/ 1996

Raj Kumar Sharma v. State of Rajasthan & Ors.

Date of Judgment: 10th April, 2007

Hon'ble Mr. Justice R. M. Lodha
Hon'ble Mr. Justice R. S. Chauhan

Mr. N. K. Maloo for the Appellant,
Mr. R. S. Rathore, Additional Advocate General for the State with
Mr. Ghanshyam Singh
Mr. R. D. Rastogi for Respondent Nos. 8 & 12,

(Per R. S. Chauhan J.):

His non-selection to the post of Junior Engineer, (henceforth to be referred to as 'the JEN", for short), had brought Raj Kumar Sharma to this court. The judgment dated 4-8-1995, whereby the learned Single Judge has dismissed his writ petition, has brought him before us.

In a nutshell, the facts of the case are that in 1985, the appellant had passed three years Diploma course in Civil Engineering with First Division (65.9%); in 1990, he passed the

AMIE Degree Course in Civil engineering; in May 1990, he also passed an Advance Diploma course in Rural Technology Development and Management, (henceforth to be referred to as ‘the Advance Diploma’, for short), with First Division (72.9%). The appellant also had work experience as he had completed training in the Public Works Department and also in the Irrigation Department during famine work; he had also worked for First Class contractors for eight months.

On 15-12-1990, the Director, Rural Development and Panchayat Raj Department (henceforth to be referred to as ‘the department’, for short) issued an advertisement for twenty-five vacancies for the post of JEN under the Rajasthan Subordinate Service (Recruitment and other Service Conditions) Rules, 1960 (henceforth to be referred to as ‘the Rules of 1960’, for short). According to the said advertisement, the qualification required for the said post was Degree or Diploma course in Civil Engineering. Moreover, it was indicated that a preference would be given to those candidates who had completed two years Diploma in Rural Technology Development &

Management--the Advance Diploma. Since the appellant fulfilled the requisite qualifications, he applied for the said post. However, he was not selected. On inquiry, the appellant discovered that the department had neither held any written examination, nor held an interview. Instead, it appointed twenty-two persons on the said post on the basis of their marks in the Diploma / Degree courses. Moreover, contrary to the advertisement, the department had not given any preference to those who had completed the Advance Course. Since the appellant felt discriminated, he filed a writ petition before this court. However, vide judgment dated 4-8-1995, the learned Single Judge has dismissed the writ petition. Hence, this appeal before us.

Mr. N. K. Maloo, the learned counsel for the appellant, has raised four contentions before us. Firstly, according to the Rules of 1960, the post of JEN is to be filled in 100% by direct recruitment. According to Rule 17 (4) of the Rules of 1960, the eligible candidates have to be interviewed by a Selection Committee chaired by the Head of the Department. However,

no interviews were held and twenty-two persons were appointed merely on the basis of their marks in their Degree or Diploma courses. Hence, the appointments have been made de hors the Rules of 1960.

Secondly, since the candidates have done their Diploma or Degree in Civil Engineering from different Universities, the Selection Committee should have considered the aggregate marks received by the candidates. Instead, while in some cases the Selection Committee has taken the marks of the Final Year, in other cases it has taken the aggregate marks of Degree/ Diploma courses into consideration. Thus, the department has applied two different parameters for similarly situated persons. In order to support this contention, the learned counsel has relied upon the case of Dr. Preeti Srivastava & Ano v State of M. P. & Ors (1999) 7 SCC 120.

Thirdly, even if the appellant is adjudged by the two different yardsticks, still he is more meritorious than the private respondents. Yet, persons less meritorious than the appellant

have been appointed, while the appellant has been left out. Thus, the appellant has been discriminated against. The learned Single Judge has failed to consider these crucial facts.

Fourthly, since the selection process is illegal, the appointments of all the private respondents would have to be set aside. This court should not show any sympathy merely because the private respondents have been working and have been promoted in the last sixteen years. In order to buttress this contention, the learned counsel has relied upon the case of State of Rajasthan v Hitendra Kumar Bhatt (1997) 6 SCC 574.

Per contra, Mr. R. D. Rastogi, the learned counsel for Respondent Nos. 8 and 12, has raised a plethora of counter-arguments: firstly, the selection process is not covered by Rule 17 of the Rules of 1960. But Rules 7 and 12 of the Rules of 1960 cover the selection. Rule 7 of the Rules of 1960, prescribes the sources of recruitment. According to Rule 7 (1) of the Rules of 1960, when the recruitment is to be made by the Appointing Authority, it shall be made “in the manner specified.”

Vide order dated 26-5-1990 the State Government had specified the manner. According to the said order, the recruitment shall be based on the percentage of the marks obtained by the candidates. Further, Rule 12 of the Rules of 1960 lays down the academic qualifications required for a post. Through the above mentioned order the academic qualifications were also laid down. The order has been incorporated into the Rules of 1960 and is shown in Part 5 of the Schedule thereto. Therefore, the department was justified in basing the selection on the marks of the final year of the Degree/ Diploma course. Thus, Rule 17 of the Rules of 1960 does not come into the picture.

Secondly, the selections were made as back as 1991. Over the period of sixteen years, many of the appointees have been promoted to the post of Superintending Engineer or Executive Engineer. Hence, it would be highly unjust to disturb their selection and promotion after a decade and a half. In order to support his contention, the learned counsel has relied upon the case of Dr. M. W. Mudhol & Ano v S. D. Halegkar & Ors.

(1993) 3 SCC 591, and on Rekha Chaturvedi v University of Rajasthan (1993 Supp (3) SCC 168).

Thirdly, the appellant has already been appointed as a Consultant in RIICO. Therefore, no fruitful purpose would be served by upsetting the entire selection process after sixteen years.

Lastly, once the appellant had taken part in the selection process, he is pre-empted from challenging the same.

Mr. R. S. Rathore, the learned Additional Advocate General, has argued firstly, the selection was made in accordance with the law. For just twenty-five vacancies, a large number of forms were received. It was decided that the department would consider only those candidates who have scored 75% or above. In order to assess the comparative merits of the candidates, the marks on the basis of which the Degree/ Diploma were granted by the universities, they were taken as the basis of selection. Therefore, in case the university

granted the Degree/ Diploma on the basis of marks obtained in the Final Year, or on the basis of aggregate marks, the respective marks formed the basis of selection. The cut off marks for the general candidates was 75.80%. Furthermore, eight candidates had completed the Advance Diploma course. Even they were considered. However, as the appellant had obtained only 65.90% in the aggregate, he was far below the cut off marks for the general category. Therefore, he could not be appointed for the said post. Hence, the department has not appointed any person less meritorious than the appellant.

Secondly, those candidates who had completed the Advance Diploma and who had not been selected had filed a number of writ petitions before this court, challenging the same selection that is under challenge in the present appeal. All the writ petitions were decided by a common Judgment in the case of Ram Swaroop Jat v State of Rajasthan (S. B. Civil Writ Petition No. 3497/1991, decided on 18-7-1991). In the said case this court had upheld the selection and appointment made by the department. The said judgment has not been

challenged. Therefore, it has achieved finality. Hence, it would not be fair to disturb the appointment when this court has confirmed it and the decision has been in operation for over a decade and a half. However, the learned Counsel fairly conceded that no interviews were held in accordance with Rule 17 (4) of the Rules of 1960. But, he tried to justify the selection and the appointments and has supported the impugned judgment.

We have heard the learned counsels for the parties, have examined the record that has been produced before this court and have perused the impugned judgment.

The Rules of 1960 have been framed in exercise of the powers conferred upon the Governor by proviso to Article 309 of the Constitution of India. Thus, these Rules have the force of law: they have to be followed in making the recruitment. Part III of the Rules of 1960 deals with “Recruitment”. Section 7 of the Rules of 1960 lays down the sources of recruitment. The relevant portions of the said Rule is as under:

Sources of Recruitment:- Recruitment to posts shall

be made:-

(1) By selection through the agency of the Commission, in respect of the posts failing within their purview, by one of interview or written examination followed by a personality and viva voce test, if necessary, as may be decided upon by Government in consultation with the Commission and in respect of other posts by the Appointing Authority "in the manner specified". (Emphasis Added).

(2) ……..

(2-A) ……..

(3) ……..

Provided:-

(1) that Government shall decide at the instance of each Appointing Authority which posts in his department shall be filled by selection and which posts by promotion and if certain categories of posts are to be filled both by selection and promotion, Government shall decide the percentage of recruitment of each method.

(2) …..

(3) …..

(4) ….

(5) ….

On the other hand, Rule 12 of the Rules of 1960 is as under:

Academic Qualifications:- A candidate for direct recruitment must possess a good working knowledge of Hindi written in Devnagari script, and such other qualifications as may be prescribed by

> the Appointing Authority with the approval of Government. ……

It is in light of these two provisions the Government had issued the order dated 26-5-1990. Thus, this order can be treated as part of the Rules or in any case a piece of delegated legislation. The conditions of eligibility prescribed in the order dated 26-5-1990 will have to be treated as having the force of law. As noted above, the said order is part of the Schedule attached to the Rules of 1960.

While Part III of the Rules of 1960 deals with "Recruitment", Part IV prescribes "the Procedure for Direct Recruitment". Rule 17 of the Rules of 1960 is as under:

> **" 17 Procedure for recruitment by Appointing Authority.** The following procedure shall be followed for making direct recruitment to any post, otherwise than through the agency of the Commission:-
>
> (1) Applications for direct recruitment to posts in the Service, shall be invited by the Appointing Authority, by advertising the vacancies to be filled, in the Official Gazette + "or" in such other manner, as may be deemed fit.
>
> (2) The application shall be made in the form approved by the Appointing Authority and

obtainable from his office on payment of such fee, as may be fixed by him, from time to time."

@ Provided that the persons repatriated from Burma and Ceylon on or after 1.3.1963 and from East African countries of Kenya, Tanganyika, Uganda and Zanzibar shall be exempted from payment of cost of application form prescribed by the Commission or the Appointing Authority, as the case may be, subject to the condition that the Commission or the Appointing Authority, as the case may be, is satisfied that such persons are not in a position to pay such fee."

(3) A candidate for direct recruitment to a post in the Service must pay the fees fixed by the Appointing Authority, in such manner as may be indicated by him.

(4) The appointing Authority shall scrutinize the applications received by him and require as many candidates eligible for appointment under these Rules as seems to him desirable to appear before a Committee for interview. The Committee shall consist of the Head of the Department, Deputy Head of the Department and an officer nominated by the Government. The Head of Department shall preside at all meetings of the Committee.

(5) The Committee shall prepare a list of the candidates whom they consider suitable for appointment to the posts, arranged in the order of merit:

Provided that the Committee may, to the extent of 50% of the advertised vacancies, keep names of suitable candidates on the reserve list. Appointment out of this list may be made in the order of merit within six months from the date on which the original list is prepared:

Provided further that the inclusion of a candidate's name in the list confers no right to appointment unless the Appointing Authority is satisfied after such enquiry as may be considered necessary that the candidate is suitable in all other respects for appointment to the Service.

(6) The list prepared by the Committee shall be sent by the Appointing Authority to the Commission, whenever necessary, together with Confidential Rolls and Personal Files of the candidates included in it as also of those superseded, if any.]

(7) On receipt of advice of the Commission, the Appointing Authority may approve the list finally with such modification as may, in its opinion, be just and proper.

Note. The Committee may also co-opt a technical person to adjudge suitability of candidates for particular post or category of posts."

Considering the above provisions the picture that emerges is as follows: Rule 7 provides the sources of recruitment. Under the first proviso of Rule 7 (3) at the instance of the Appointing Authority, the Government is empowered to decide which posts shall be filled in by "selection". It is equally empowered to decide the percentage of recruitment by each method, i.e. by direct recruitment or promotion. Rule 12 lays down the academic qualifications. Thus, the Government is empowered to prescribe the academic qualifications, the method of recruitment and the percentage for filing up the posts, i.e. by direct recruitment or promotion. Consequently, vide order dated 26-5-1990 the Government has laid down the qualifications and the percentage for filling up the post of JEN;

the said order is now included as a Schedule in the Rules of 1960. According to the said Schedule, the post of JEN is post to be filled in 100% by direct recruitment. The qualification required for the post is “Degree in Civil Engineering of a University established by law in India or qualifications declared equivalent by Government, or Diploma in Civil Engineering from a recognized Institution.”

The procedure for direct recruitment is contained in Rule 17 of the Rules of 1960. The procedure required to be followed is as under:

1) The Appointing Authority shall invite applications by advertising the vacancies.
2) The Appointing Authority shall scrutinize the applications. It must decide the number of candidates “eligible for appointment under the Rules as seem to him to be desirable to appear before a Committee for interview.
3) A Committee shall be constituted for interviewing the eligible candidates. The Committee shall consist of the

Head of the Department, Deputy Head of the Department and an Officer nominated by the Government. The Committee may also co-opt a technical person to adjudge suitability of candidates for particular post or category of posts. The Head of the Department shall preside at all the meetings of the Committee.

4) The Committee shall prepare a list of candidates whom they consider suitable for appointment to the posts, arranged in the order of merit.

It was not disputed by the Additional Advocate General that the department neither constituted a Committee, nor held any interview as required by Rule 17 (4) of the Rules of 1960. He did admit that the procedure for selection by direct recruitment contemplated under Rule 17(4) was not followed.

Of course, Mr. R. D. Rastogi argued that Rule 17 is inapplicable as the selection is to be made “in the manner specified” under Rule 7 and in accordance with the academic

qualifications laid down by Rule 12 of the Rules of 1960. Vide order dated 26-5-90, the Government had specified the manner, had laid down the academic qualification and had fixed the “percentage”. The learned counsel would have us believe that the order in the form of the Schedule to the Rules of 1960 has established “the percentage” required in the academic qualifications. However, such an interpretation is misplaced. For, the Second column in the Schedule clearly reads, “Method of recruitment with percentage”. Therefore, the word “percentage” refers to the “method of recruitment” and not to “the academic qualifications”. In case the appointment is to be made from two different sources, i.e. from direct recruitment and from promotion, then the Government is empowered under Rule 7 of the Rules of 1960 to specify the percentage from each method of recruitment. This is precisely what the Government has done through the order dated 26-5-1990. According to the Schedule, for the post of JEN, the percentage is specified as 100% from direct recruitment. Therefore the word “percentage” cannot be read as referring to the “percentage” obtained by a candidate in his Degree/ Diploma of

Civil Engineering as contended by the learned counsel. It clearly refers to the “method of recruitment”. Thus, the contention raised by Mr. R.D. Rastogi is unacceptable.

That the procedure prescribed under Rule 17 (4) was needed to be followed by the department for direct recruitment does not seem to us to be in doubt. Non-compliance of the procedure has affected the legality of selection. As to whether at this distance of time, the entire selection deserves to be interfered with or not shall be seen by us a little later.

Another contention raised by Mr. Maloo is about the double standards employed by the department for determining the basis of the selection. While for some candidates the basis of selection was the marks obtained by the candidate in the Final Year of Degree/ Diploma course, for others the basis is the aggregate marks obtained by them at the end of Degree/ Diploma course.

Rule 12 read with the Schedule attached to the Rules of 1960 prescribes the academic qualification, which the candidate must possess for the post of JEN. The prescribed qualification is a Degree or Diploma in Civil Engineering. From the available material, it transpires that different Universities award Degree or Diploma on different basis viz., some Universities Degree/Diploma on the basis of the marks obtained in the Final Year while the other award on the basis of the aggregate marks obtained at the end of Degree/Diploma course. Though the method of determining the comparative merit of the candidates based on such assessment may not be very satisfactory and criticism to such method is not unjustified but the fact of the matter is that it would not have been proper for the department to look into the Degree/Diploma awarded by the University from a different benchmark for the purpose of assessing the comparative merit of the candidates. The case of Dr. Preeti Srivastava & Ano. (Supra) was relied upon by Mr. N.K. Maloo. While dealing with admission in Post-Graduate Medical Course, the Hon'ble Supreme Court noticed the need for a common entrance examination, when it observed, "There

may be several universities in a State which conduct MBBS courses. The courses of study may not be uniform. The quality of teaching may not be uniform. The standard of assessment at the MBBS Examination also may not be uniform in the different universities. A common entrance examination, therefore, provides a uniform criterion for judging the merit of all candidates who come from different universities." We are afraid the aforesaid observations cannot be applied to the present fact - situation. The Rules do not provide for any written examination for selection by direct recruitment. It is not necessary in law as well.

Based on the uniform pattern that the department followed which may not be unblemished but not unconstitutional altogether, it is pertinent to notice here that the petitioner is not more meritorious that the private respondents. According to the Rules of 1960 the eligibility requirement for the post of JEN is "Degree in Civil Engineering of a University established by law in India or qualification declared equivalent by Government or Diploma in Civil Engineering from a recognized Institution".

According the advertisement issued by the department, after fulfilling the above-mentioned eligibility, those who have completed the Advance Course would be given preference in the appointment to the post of JEN. According to the counsel for the appellant, since the appellant had completed the Advance Course, he should have been given preference. However, the State has rightly contended that the preference could be given only after the candidate first fulfills the basic eligibility requirement. According to the record, the cut off marks for the general category candidate was 75.80% obtained by respondent No. 16, Mr. Arvind Kumar Saxena, before this court. Certainly, the advertisement claimed that candidates who have completed the Advance Diploma would be given preference. But, such a preference can be given only if the candidate possessing Advance Diploma was otherwise having merit. The respondent No. 14, Suresh Chand has 76.00%, respondent No. 16, Arvind K. Saxena has 75.80%, on the other hand, the appellant has merely 65.90%. Obviously, the appellant is far below them in merit. Moreover, although the appellant has pleaded that respondent No. 17, Mr. Rajesh

Kumar, is less meritorious than him as he has only 72.69%, but Mr. Rajesh Kumar belongs to the Schedule Caste category. Hence, the appellant and Mr. Rajesh Kumar belong to two different categories. Since none of the private respondents are less meritorious than the appellant, the contention of the learned counsel for the appellant that persons who are less meritorious than the appellant have been appointed is unacceptable.

The question, now, is that though for non-compliance of Rule 17(4), the legality of the selection process is affected, does it deserve to be interfered with at this distance of time. The submission of Mr. N. K. Maloo is that merely because the private respondents have been working or have been promoted during the last sixteen years, the court should not be sympathetic to their cause. In order to support his contention, he has relied on the case of Hitendra Kumar Bhatt (Supra). However, that case dealt with a person who did not possess the requisite qualifications. But under the interim orders of the High Court, Hitendra Bhatt was appointed and continued in his

service, of course subject to the decision of the writ pending before the High Court. Subsequently, his writ petition was dismissed and his services were terminated. He, therefore, filed an appeal before the Division Bench. The Division Bench allowed the appeal. The State of Rajasthan filed an SLP before the Apex Court. The Apex Court observed, “It was on account of interim orders which were obtained by the respondent that he was given appointment and continued. He was aware that his appointment was subject to the outcome of his petition. One cannot, therefore, take too sympathetic a view of the situation in which the respondent finds himself.” It is in these circumstances that the Hon’ble Supreme Court has held that a sympathetic view cannot be taken on the ground that the persons have been working for a long time.

However, fact – situation of the present case is different. In the present case, the private respondents as well as the present appellant had applied for the post as per the advertisement. After scrutinizing their applications and based on comparative merit, though without holding the interview by

the committee, the department had appointed the private respondents. Their appointments were not made because of any interim order. As far as they were concerned, the appointments were bona fide. If there were any fault in the selection process, the private respondents cannot be blamed for it. In the case of Dr. M. S. Mudhol & Ano (Supra) the Hon'ble Supreme Court was seized of a matter when the appointment of the respondent as the Principal of the Delhi Kannada Senior Secondary School was questioned. Although the Apex Court concluded that the appointment was illegal, yet it observed, "Since we find that it was the default on the part of the 2nd respondent, Director of Education in illegally approving the appointment of the first respondent in 1981 although he did not have the requisite academic qualifications as a result of which the 1st respondent has continued to hold the said post for the last 12 years now, it would be inadvisable to disturb him from the said post at this late stage particularly when he was not at fault when his selection made." The Hon'ble Supreme Court reiterated the same view in the case of Rekha Chaturvedi (Smt) v University of Rajasthan (1993 Supp (3) SCC 168).

Besides, through seven different writ petitions, Ram Swaroop Jat and others had challenged the selection process of these very vacancies before this court. Vide Judgment dated 18-7-1991 the Single Judge upheld the selection process. Though we are not in agreement with the reasoning of the Single Judge in its eitirety for what we have observed above but the fact of the matter is that the said decision was not challenged and reached finality. It would be improper to unsettle the settled appointments because of some illegality in the selection process for non-compliance of Rule 17(4) after an inordinate lapse of sixteen years, considering the fact that the private respondents were appointed a decade and a half ago, considering the fact that many of them have been promoted as Superintending Engineers and Executive Engineers and last but not the least that no person less meritorious than the appellant has been appointed.

This appeal is, accordingly, dismissed. There shall be no order as to costs.

R. S. Chauhan J. R. M. Lodha J.